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Supreme Court, U.S.
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OFFICE OF THE CLERK

No._____

In the Supreme Court of the United States

AUTOMATED SWITCHING & CONTROLS, INC. et al.,
Petitioners
v.
AMELCO INDUSTRIES, INC. et al.,
Respondents,

On Petition for a Writ of Certiorari to the
COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

APPENDIX

*Counsel of Record
Brenda Reddix Smalls*
7609 Yorkhouse Rd.
Columbia, SC. 29223
(803) 238-1578

Peter Glor
6621 Calle Eva Miranda
Irwindale, Ca. 91702
(626) 969-8441

Counsels for Petitioner

Dr. Eric MacCalla
In pro se
P.O. Box 93037
Pasadena, Ca. 91109
(626) 791-7197

Dr. Johnetta MacCalla
In pro se
P.O. Box 93037
Pasadena, Ca. 91109
(626) 791-7197

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APPENDIX A

FILED APR 25 2007
CALIFORNIA SUPREME COURT
Federick K. Ohirich Clerk

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Deputy

Court of Appeal, First Appellate District, Div. 4 – No. A109274
S150435

IN THE SUPREME COURT OF CALIFORNIA

En Banc

AMELCO INDUSTRIES, INC., et al., Plaintiffs, Cross-defendants and Respondents,

v.

AUTOMATED SWITCHING & CONTROLS, INC., et al., Defendants, Cross-complainants and Appellants

The petition for review is denied.
The request for an order directing publication of the opinion is denied.

GEORGE

_____
Chief Justice

APPENDIX B
Filed 1/12/07

Amelco Industries v. Automated Switching & Controls

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

A109274

(No. H-184673-9)

AMELCO INDUSTRIES, INC. et al.,

Plaintiffs, Cross-defendants and Respondents,

v.

AUTOMATED SWITCHING & CONTROLS, INC. et al.,

Defendants, Cross-Complainants and Appellants.

An electrical contractor terminated a communications equipment subcontractor from two large public works projects for urban transportation systems. The prime contractor then sued the subcontractor for breach of contract and related claims founded upon allegations of untimely and deficient performance. The subcontractor cross-complained for breach of contract and a score of other claims. The subcontractor maintained that it had duly performed the contracts and was wrongly terminated.

The prime contractor prevailed in a series of pretrial rulings and a bifurcated trial to the bench and jury. The prime contractor recovered $688,588 in damages (including prejudgment interest), and its sureties were awarded over $1

million in attorney fees and costs. The subcontractor appeals. The subcontractor's primary challenge is to the preclusive effect the trial court gave transit agency decisions finding the subcontractor responsible for substantial delays on the construction projects. We reject that challenge, and all others, and affirm the judgment.

FACTS[1]

At the center of a complicated dispute are two public works projects to construct or upgrade public transportation systems. Respondent Amelco Industries, Inc. was the prime electrical contractor and appellant Automated Switching & Controls, Inc. (ASCI) was a communications equipment subcontractor. In January 1994, Amelco subcontracted with ASCI to design and deliver a radio system on a project for the San Francisco Bay Area Rapid Transit District (BART). The parties executed a similar subcontract in May 1994, to furnish a radio system on a Los Angeles County Metropolitan Transit Authority (MTA) project.

A. Amelco terminated the BART subcontract on May 12, 1995, and the MTA subcontract on May 24, 1995. Under laws regulating public works contracting, a prime contractor may not substitute a person as subcontractor in place of the subcontractor listed in the original bid without the consent of the public entity that awarded the contract. (Pub. Contract Code, § 4107, subd. (a) see generally R.J. Land & Associates Construction Co. v. Kiewit-Shea (1999) 69 Cal.App.4th 416, 419-421 [summarizing public works contracting law].) The awarding authority may consent to the substitution if, among other situations, it determines that the subcontractor's performance was substantially deficient or delayed. (Pub. Contract Code, § 4107, subd. (a)(7).) Amelco sought the transit agencies' consent to its termination of ASCI and substitution of another

subcontractor. MTA approves substitution of ASCI

MTA notified ASCI of the requested substitution and advised it of its right to a hearing with the awarding authority. (Pub. Contract Code, § 4107.) On May 26, 1995, ASCI formally objected to its substitution and asked MTA for a meeting of the principals to resolve the dispute. MTA staff met with Amelco and ASCI on June 14, 1995, but no resolution was reached. On June 29, 1995, the parties submitted documentation to the MTA supporting their conflicting positions. Amelco maintained that ASCI had substantially delayed the project based upon late and inadequate design submittals and failure to produce an approvable design. ASCI contended that it had performed satisfactorily and blamed any deficient performance upon Amelco for conflicting directives and a "lack of committed resources." MTA staff evaluated the documentation and concluded that ASCI had substantially delayed the progress of the project by not producing an approvable design. MTA staff recommended granting consent to the substitution.

On August 10, 1995, the MTA construction committee held a public hearing to consider the staff report, and forwarded the matter to the full board. On October 25, 1995, the MTA board of directors held a public hearing at which Amelco and ASCI were each given time to present their case. ASCI's principals, as well as its attorney, made statements to the board. The directors debated the matter and asked questions of the parties before determining that the statutory requirements for subcontractor substitution were met. (Pub. Contract Code, § 4107.) MTA approved Amelco's substitution of ASCI by another subcontractor.

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1. Our review of the facts was slowed by appellants' submission of an appendix lacking relevant documents and consecutively numbered pages. (Cal. Rules of Court, rules 8.1 24(b)(1)(B) & (d)(1), 8.1 44(a)(1)(D).) Appellants are cautioned to comply with all court rules in the future.

B. BART approves substitution of ASCI

A similar process followed Amelco's termination of the BART subcontract, but with even greater scrutiny by the awarding authority. In May 1995, Amelco asked BART to approve substitution of ASCI. ASCI objected to the substitution and a BART hearing officer held a four-day evidentiary hearing in November 1995. Testimony was received and extensive documentation reviewed. The hearing officer concluded that the statutory requirements for subcontractor substitution were met because ASCI substantially delayed progress of the work. (Pub. Contract Code, § 4107, subd. (a)(7).) The hearing officer further found that "ASCI's delays were of a cumulative and continuing nature and therefore not likely to be subject to cure within a reasonable time. The evidence presented did not show a pattern of improvement and showed ASCI did not even perform to its own amended schedules." The BART hearing officer issued his decision approving substitution of ASCI on December 11, 1995.

C. Litigation ensues

Meanwhile, Amelco initiated this court action in July 1995, during pendency of the administrative proceedings. Amelco pleaded causes of action for breach of contract and declaratory relief against appellants ASCI and its principals, Eric and Johnetta MacCalla. ASCI and the MacCallas cross-complained with numerous causes of action against respondents Amelco and its sureties, United Pacific Insurance Company and Reliance Insurance. ASCI's causes of action included breach of contract and racial discrimination in violation of federal civil rights. ASCI is a minority-owned business, and it alleged that Amelco terminated the subcontracts because ASCI refused to participate in an "illegal scheme" to act as "a front" to "pass through" equipment purchases that would satisfy Amelco's minority business participation obligations.

D. Administrative decisions given collateral estoppel effect

In August 1997, Amelco moved for a separate bench trial on the issue of whether the BART and MTA administrative findings that ASCI substantially delayed the construction projects precluded ASCI's claims of wrongful termination of the subcontracts under principles of collateral estoppel. In arguing its motion, Amelco said that the BART and MTA findings were final because the time for filing petitions for writs of mandamus had passed. ASCI opposed the motion. ASCI claimed that the BART and MTA administrative hearings had not been quasi-judicial, and thus were not entitled to collateral estoppel effect. ASCI also maintained that any administrative findings were not final because the time for filing petitions for writs of mandamus had not yet elapsed. In October 1997, the trial court directed ASCI to file petitions for writs of mandamus and stayed trial until the proceedings on the petitions were concluded.

ASCI filed a petition for a writ of mandamus in Alameda County Superior Court with respect to the BART administrative findings, and a petition in Los Angeles County Superior Court on the MTA findings. (Code Civ. Proc., § 1094.5.) Both petitions were denied. In April 1998, the Alameda court found that BART provided ASCI with a fair trial compliant with due process and substantial evidence supported BART's finding that "ASCI had substantially delayed the progress of the work." In September 1998, the Los Angeles court denied ASCI's petition on the ground that its "request for mandamus is moot due to the fact that [MTA's] project is essentially complete and such relief would serve no useful purpose." Amelco represents, without contradiction, that ASCI did not appeal the denial of the petitions.

The trial court in this case gave collateral estoppel effect to the BART and MTA administrative decisions that ASCI had substantially delayed the progress of the work on the public transit construction projects, and precluded ASCI from contending otherwise. On the parties' competing causes of action for breach of contract, the court ruled that ASCI's substantial delay was a material breach of the subcontracts justifying their termination and that calculation of damages was the only issue remaining for trial. The court also ruled that ASCI and its principals were collaterally estopped from asserting that Amelco acted with discriminatory intent in terminating the subcontracts, or breached the covenant of good faith and fair dealing by terminating ASCI without cause.

E. The jury awards Amelco breach of contract damages

The court instructed the jury that ASCI breached the subcontracts and directed the jury to determine the amount of damages caused by the breach and recoverable under the terms of the contract. In March 2002, the jury returned a verdict finding that Amelco suffered damages of $63,838.64 in completing ASCI's unfinished work on the BART project, and $500,826.90 in damages on the MTA project.

F. The court finds that ASCI is the alter ego of the MacCallas

Eric MacCalla and Johnetta MacCalla, husband and wife, are the sole directors and shareholders of ASCI. ASCI declared bankruptcy in February 2001. Amelco alleged that a unity of interest and ownership existed between ASCI and the MacCallas such that each is the alter ego of the other, and maintained that the MacCallas should thus be held liable for breach of ASCI's subcontracts. The trial court agreed. The court found,

among other things, that ASCI was undercapitalized and that the MacCallas "exercised complete dominion and control" over ASCI and a related family-owned company, commingled funds among themselves and the two companies, and used the companies as conduits for their personal business The court determined that ASCI was the alter ego of the MacCallas, and held the MacCallas jointly and severally liable with ASCI.

DISCUSSION

Appellants ASCI and the MacCallas present numerous claims on appeal. Appellants contend that the trial court erred by (1) giving collateral estoppel effect to transit agency decisions finding ASCI responsible for substantial delays on the construction projects and applying those agency findings to several causes of action; (2) granting a nonsuit motion on appellant's discrimination cause of action; (3) imposing alter ego liability upon the MacCallas for the acts of their closely held corporation; (4) sustaining objections to expert witness testimony on damages; and (5) awarding excessive or unauthorized damages. We consider each of these contentions in turn.

A. Administrative determinations that ASCI substantially delayed progress on the construction projects were entitled to collateral estoppel effect

Appellants contend that the trial court erred in according collateral estoppel effect to the BART and MTA administrative decisions that ASCI had substantially delayed the progress of the work on the public transit construction projects. Appellants maintain that the administrative proceedings were not entitled to preclusive effect because the proceedings lacked a judicial character and did not provide a full and fair opportunity to litigate the issues. Appellants claim that the doctrine of collateral

estoppel was otherwise misapplied because the issue precluded in this litigation was not identical to that decided in the administrative proceedings, the administrative decisions were not final, and collateral estoppel was extended to parties beyond those who participated in the administrative proceedings. Appellants also contest the way collateral estoppel was applied to particular causes of action. We address these concerns, and conclude that the trial court did not err.

1. General principles of collateral estoppel

" 'Collateral estoppel is one aspect of the broader doctrine of res judicata . . . . "Where res judicata operates to prevent relitigation of a cause of action once adjudicated, collateral estoppel operates . . . to obviate the need to relitigate issues already adjudicated in the first action . . . . The purposes of the doctrine are said to be 'to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of the judicial system, [and] to protect against vexatious litigation.' " ' " *(Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 147-148.)

The California Supreme Court has recently reiterated the guiding principles of collateral estoppel: " 'Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings.' [Citation.] The doctrine applies 'only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations.] The party asserting collateral estoppel bears the burden of establishing these

requirements.' " *(Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 943.)

The doctrine of collateral estoppel has traditionally "been applied to give conclusive effect in a collateral court action to a final adjudication made by a court in a prior proceeding." *(People v. Sims* (1982) 32 Cal.3d 468, 477.) But the doctrine may also be applied to administrative decisions possessing a judicial character. *(Pacific Lumber Co. v. State Water Resources Control Bd., supra,* 37 Cal.4th at p. 944.) "Indicia of proceedings undertaken in a judicial capacity include a hearing before an impartial decision maker; testimony given under oath or affirmation; a party's ability to subpoena, call, examine, and cross-examine witnesses, to introduce documentary evidence, and to make oral and written argument; the taking of a record of the proceeding; and a written statement of reasons for the decision." *(Id.* at p. 944.) Amenability to writ review under Code of Civil Procedure section 1094.5 is another factor in determining whether an administrative decision is quasi-judicial for collateral estoppel purposes. *(Pacific Lumber Co. v. State Water Resources Control Bd., supra,* at p. 944, fn. 12.)

2. The threshold requirements of collateral estoppel were met

Appellants ASCI and the MacCallas maintain that these standards for application of collateral estoppel were not met here. As to the threshold requirements itemized above, appellants contend that (1) the issue precluded from relitigation was not identical to that decided in the MTA and BART proceedings; (2) the MTA and BART decisions were not final; and (3) the parties against whom preclusion was applied were not the same as, or in privity with, the parties to the MTA and BART proceedings. The contentions are without merit.

a. Identical issues

Issues are identical, for purposes of collateral estoppel, where " 'identical factual allegations' are at stake" in the previous and current proceeding. *(Lucido v. Superior Court* (1990) 51 Cal.3d 335, 342.) The issue precluded from relitigation in the current action was that ASCI substantially, and unjustifiably, delayed the public works projects. This issue is identical to the one necessarily determined by the administrative agencies in approving ASCI's substitution as a subcontractor on a public works project. A subcontractor may not be substituted on a public works contract unless the awarding authority consents to the substitution, and consent is restricted to specified situations, including where the awarding authority "determines that the work performed by the . . . subcontractor is substantially delaying or disrupting the progress of the work." (Pub. Contract Code, § 4107, subd. (a)(7).) BART and MTA, in approving ASCI's substitution, necessarily found that ASCI was responsible for substantial delays.

ASCI denies this fact, and asserts on appeal that the administrative hearings determined only that there had been substantial delay on the projects, and never determined that ASCI was at fault for the delay. Yet the statute for subcontractor substitution plainly requires a determination that the subcontractor is delaying the project, and not simply a determination that delays exist. (Pub. Contract Code, § 4107, subd. (a)(7).) The record of the administrative proceedings also belies ASCI's assertion that it was never determined to be at fault for the delays.

The BART hearing officer issued a written decision in which he expressly stated that "ASCI's delays were evaluated in terms of source, substantiality and ability to cure." The hearing officer "acknowledged ASCI's claim that some of the delays were caused by factors outside its control

but found these instances not to be the controlling evidence in this hearing . . . . " ASCI's excuses for the delays were extensively reviewed, and rejected. BART concluded that ASCI was responsible for unjustifiable delays "in providing final designs, testing procedures and training procedures," and "found that the ASCI's delays were of a cumulative and continuing nature and therefore not likely to be subject to cure within a reasonable time. The evidence presented did not show a pattern of improvement and showed ASCI did not even perform to its own amended schedules." The superior court, on mandamus review, concluded that "BART's findings that ASCI had substantially delayed the progress of the work are supported by substantial evidence."

MTA reached a similar conclusion that ASCI was responsible for delaying the project. MTA staff evaluated the parties' arguments and documentation and recommended ASCI's substitution as a subcontractor upon determining that "ASCI has not produced an approvable design, which has substantially delayed the progress of the work and further delays will seriously impact project schedule." The MTA board of directors approved the staff recommendation and determined that the requirements for subcontractor substitution had been met. On appeal, ASCI argues that MTA allowed the substitution just to keep the project going, and did not truly decide that ASCI was the party at fault for the delays. The argument relies upon the comments of one of the MTA directors at the board meeting. Director Robert Abernethy remarked that the MTA board could approve the substitution without sifting "through all the allegations that have been made here" by the parties and that it was for the courts to assess liability. We do not understand these remarks to indicate that Director Abernethy, much less MTA as a whole, neglected the statutory obligation to approve substitution of a subcontractor only upon determining that the subcontractor

is substantially delaying the progress of the work. (Pub. Contract Code, § 4107, subd. (a)(7).) The remarks show no more than a director's reluctance to become embroiled in the parties' dispute, which involved issues beyond the question of ASCI's delays.

ASCI argues that, even if BART and MTA found ASCI at fault for the project delays, there is still a lack of identity of issues between those administrative proceedings and this court action because the BART and MTA proceedings concerned administrative standards and remedies, not the disparate matters of civil liability and damages presented here. ASCI misunderstands the doctrine of collateral estoppel. As noted above, issues are identical, for purposes of collateral estoppel, where " 'identical factual allegations' are at stake" in the previous and current proceeding. *(Lucido v. Superior Court, supra,* 51 Cal.3d at p. 342.) In assessing identity of issues, it does not matter that the two proceedings threaten different sanctions, require different burdens of proof, or provide different remedies. *(Ibid.; People v. Sims, supra,* 32 Cal.3d at p. 485; *Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235, 244-245.)

b. Final determination

The MTA and BART decisions are plainly final. MTA approved the subcontractor substitution in October 1995, and BART issued its decision approving substitution of ASCI in December 1995. ASCI challenged each decision by filing petitions for writs of mandamus. (Code Civ. Proc., § 1094.5.) The petitions were denied as to BART in June 1998, and as to MTA in September 1998. ASCI did not appeal from the denial of its writs, and the time to appeal has long since passed. The administrative decisions and court judgments are free from direct attack and thus final. *(People v. Sims, supra,* 32 Cal.3d at pp. 485-486.)

c. Privity

The trial court held that the BART and MTA decisions estopped ASCI from denying that it substantially delayed the progress of the work, and estopped ASCI and the MacCallas from asserting that Amelco's termination of the subcontracts was with the intent to discriminate. Appellants argue that ASCI alone was a party to the administrative proceedings, and that the MacCallas were not in privity with ASCI and therefore wrongly estopped.

> " 'Privity is essentially a shorthand statement that collateral estoppel is to be applied in a given case; there is no universally applicable definition of privity.'

[Citation.] The concept refers 'to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is "sufficiently close" so as to justify application of the doctrine of collateral estoppel.' " *(People v. Sims, supra,* 32 Cal.3d at pp. 486-48 7.) " 'In the context of collateral estoppel, due process requires that the party to be estopped must have had an identity or community of interest with, and adequate representation by, the losing party in the first action as well as that the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication.' [Citations.] The 'reasonable expectation' requirement is satisfied if the party to be estopped had a proprietary interest in and control of the prior action, or if the unsuccessful party in the first action might fairly be treated as acting in a representative capacity for the party to be estopped." *(Lewis v. County of Sacramento* (1990) 218 Cal.App.3d 214, 218.)

Here, ASCI and the MacCallas were sufficiently close to warrant applying collateral estoppel. The MacCallas were the sole officers and shareholders of ASCI, and the trial court found that they "exercised complete dominion and control" over the corporation. The MacCallas

were also active participants in the administrative proceedings, and their interests were fully represented and vigorously litigated in those proceedings by their closely held corporation. While issues decided against a corporation are not usually conclusive against its management and stockholders in subsequent litigation, an exception has been recognized for closely held corporations. *(Gottlieb v. Kest, supra,* 141 Cal.App.4th at pp. 150-15 1.)

"As explained in the commentary to the Restatement [of Judgments]: 'When the corporation is closely held, . . . [the] interests of the corporation's management and stockholders and the corporation itself generally fully coincide. By definition, the stockholders are few in number and either themselves constitute the management or have direct personal control over it. In many respects, the enterprise is a proprietorship or partnership conducted in corporate form. . . . [¶] . . . When the corporation is the party to the litigation, a controlling owner who participates in the conduct of the litigation ordinarily has full opportunity and adequate incentive to litigate issues commonly affecting him and the corporation.' " *(Gottlieb v. Kest, supra,* 141 Cal.App.4th at pp. 15 1-152, quoting Rest.2d Judgments, § 59, com. e, pp. 99-100, italics omitted.) Such is the case here, where the MacCallas and ASCI had a unity of interest and a shared motivation to resist subcontractor substitution by the administrative agencies. ASCI, under the MacCallas' direct control, adequately represented the MacCallas' interest as well as its own corporate interest in the contested administrative hearings.

3. The judgment affirming the BART administrative decision is binding

The parties' appellate briefing focuses exclusively upon the BART and MTA administrative decisions, and debate whether the decisions are entitled to preclusive

effect under standards relevant to administrative acts. What the parties fail to recognize is that we are not concerned solely with administrative acts. Petitions for writs of mandate were filed challenging the administrative decisions. There was no final judicial determination on the merits of the MTA decision, as the court denied the petition as moot. However, the court reached the merits of the BART decision in denying the writ of mandate. The court found that ASCI received a fair trial and that "BART's findings that ASCI had substantially delayed the progress of the work are supported by substantial evidence."

As to the BART proceedings, we are therefore concerned with evaluating the preclusive effect of a court judgment in mandamus. It is beyond question that "the doctrine of res judicata applies to judgments on the merits in proceedings in mandamus." *(Hollywood Circle, Inc. v. Dept. of Alcoholic Beverage Control* (1961) 55 Cal.2d 728, 733; accord *Napa Valley Electric Co. v. Railroad Commission of the State of California* (1920) 251 U.S. 366, 372-373; *Takahashi v. Board of Education* (1988) 202 Cal.App.3d 1464, 1474, 1482.) In *Hollywood Circle, Inc.*, a store owner's liquor license was revoked by an administrative agency. *(Hollywood Circle, Inc., supra,* at pp. 729-730.) The store owner's administrative appeal was dismissed as untimely, and the owner sought a writ of mandate to compel reconsideration of the appeal. *(Id.* at p. 730.) The superior court denied the writ and the intermediate appellate court affirmed. *(Ibid.)* The store owner mounted a subsequent challenge to the agency's dismissal of its appeal, which was found barred by the doctrine of res judicata. *(Id.* at pp. 730-733.) The California Supreme Court found that the quasi-judicial administrative board determination was binding and, moreover, that "we are not here concerned solely with the act of the board. . . . The judgment denying the writ was affirmed on appeal and has now become final." *(Id.* at p. 733.) Accordingly, "[t]he

determination in the first mandate proceeding that the dismissal of [the store owner's administrative] appeal was proper therefore bars any further inquiry into that question." *(Ibid.)*

Similarly, the judgment denying ASCI's writ challenging BART's determination that ASCI substantially delayed the construction project was on the merits and is final. Apart from any preclusive effect of the BART administration decision itself, the court judgment on the merits in the mandamus action is itself conclusive.

4. MTA's quasi-judicial administrative finding is binding

a. Appellants contest the judicial character of the MTA proceedings

The MTA proceedings, unlike the BART proceedings, did not result in a final judicial determination on the merits. We must therefore evaluate the preclusive effect of the administrative decision. As noted above, collateral estoppel may be applied to administrative decisions possessing a judicial character. *(Pacific Lumber Co. v. State Water Resources Control Bd., supra,* 37 Cal.4th at p. 944.) Appellants ASCI and the MacCallas argue that the MTA proceedings did not possess a judicial character because there was no impartial decision maker; no sworn testimony; no opportunity to subpoena or cross-examine witnesses; and no written statement of reasons for the decision. The MTA hearing, appellants note, departed from procedures followed by agencies operating under the Administrative Procedure Act (APA). (Gov. Code, § 11500 et seq.)

Respondents Amelco and its sureties claim that appellants' argument alleges mere procedural defects, and that any such defects may be challenged only in a petition for writ of mandate. Respondents rely upon cases holding that a quasi-judicial decision not overturned in a mandamus

proceeding (whether for substantive *or* procedural reasons) is entitled to preclusive effect. (E.g., *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 69-70.) In short, respondents suggest that the finality of the MTA administrative decision entitles the decision to preclusive effect without any analysis of the fundamental character of the MTA proceeding. Respondents are mistaken. Nothing in *Johnson* suggests a departure from the long-established principle that only quasi-judicial administrative proceedings that provide a full and fair opportunity to litigate the issues are entitled to preclusive effect. *(Id.* at pp. 71, fn. 3; see *Pacific Lumber Co. v. State Water Resources Control Bd., supra,* 37 Cal.4th at p. 944; *People v. Sims, supra,* 32 Cal.3d at p. 479.) Appellants are not alleging mere procedural defects that must be litigated in a mandamus proceeding. Appellants are alleging that the MTA proceeding did not possess a judicial character. We therefore turn to a consideration of the MTA proceeding.

b. The statutory scheme

To understand the true character of the administrative proceeding, a brief overview of subcontracting under public contracting law is necessary. The Subletting and Subcontracting Fair Practices Act (hereafter, "act" or "subcontracting act") regulates contracts for public works. (Pub. Contract Code, § 4100 et seq.)[2] "It requires the prime contractor to list, in its bid to the public agency, the subcontractors who will be used, and strictly regulates the circumstances under which the listed subcontractors may be changed. Its purpose is to protect the public and subcontractors from the evils of 'bid shopping and bid peddling.' In 'bid shopping,' a prime contractor uses the bid of the listed subcontractor to pressure other subcontractors to do the work for even less, to the contractor's profit. In 'bid peddling,' conversely, other subcontractors undercut the known bid of the listed subcontractor. . . . [¶] To achieve the legislative purpose,

the act:

(1) requires the prime contractor to list in its bid each subcontractor who will perform work in an amount in excess of one-half of 1 percent of the prime contractor's bid, to describe the work which will be done by each subcontractor, and to list only one subcontractor for each portion as defined in the prime contractor's bid (§ 4104); (2) requires the prime contractor itself to perform any work for which the prime contractor either fails to specify a subcontractor or specifies more than one subcontractor for the same portion of work (§ 4106); and (3) prohibits the prime contractor to substitute any other subcontractor for the subcontractor listed in the original bid, except in specified narrow circumstances (§§ 4107, 4107.5)." *(R.J. Land & Associates Construction Co. v. Kiewit-Shea, supra,* 69 Cal.App.4th at pp. 4 19-420.) One of the accepted circumstances for substitution of a subcontractor is "[w]hen the awarding authority, or its duly authorized officer, determines that the work performed by the listed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans and specifications, or that the subcontractor is substantially delaying or disrupting the progress of the work." (§ 4107, subd. (a)(7).)

Where, as here, the prime contractor asks to substitute a subcontractor, the subcontractor may object to the substitution and obtain a hearing: "Prior to approval of the prime contractor's request for the substitution, the awarding authority, or its duly authorized officer, shall give notice in writing to the listed subcontractor of the prime contractor's request to substitute and of the reasons for the request." (§ 4107, subd. (a).) The subcontractor has five days to submit written objections to the substitution to the

2 All further section references are to the Public Contract Code, except as noted.

awarding authority. (§ 4107, subd. (a).) "If written objections are filed, the awarding authority shall give notice in writing of at least five working days to the listed subcontractor of a hearing by the awarding authority on the prime contractor's request for substitution." (§ 4107, subd. (a).)

c. The nature of the MTA proceedings was quasi-judicial

The subcontracting act does not specify hearing requirements, and the process apparently varies among the agencies awarding public contracts. (See *Boctor v. Los Angeles Metropolitan Transit Authority* (1996) 48 Cal.App.4th 560, 571 [public transit agency not bound by APA].) In this case, BART appointed an arbitrator who held a four-day evidentiary hearing Each party at the BART hearing was permitted to submit documentary evidence, to produce witnesses and to cross-examine opposing witnesses, to be represented by counsel, and to brief all legal issues. The proceedings were recorded and the BART hearing officer issued written findings. The MTA hearing process was less rigorous, but still comprehensive. Each party was permitted to submit documentary evidence, to make statements, to be represented by counsel, and to brief all legal issues. The proceedings were recorded and MTA staff made preliminary written findings that were submitted to the MTA board and considered by the board in making its determination. Both the BART and MTA administrative decisions were subject to writ review. (Code Civ. Proc., § 1094.5.)

It is true, as appellants argue, that the MTA proceedings did not permit sworn testimony, the cross-examination of witnesses or certain other attributes of judicial proceedings. Indisputably, the MTA hearing did not afford procedures equivalent to those established by the

APA. (Gov. Code, § 11500 et seq.) These facts, however, are not determinative on the question of whether the MTA decision is entitled to collateral estoppel effect. "The cases contain no requirement for an APA-style hearing." *(Mola Development Corp. v. City of Seal Beach* (1997) 57 Cal.App.4th 405, 412.) " 'The protective provisions of the California APA do not define the minimum procedural safeguards which must be afforded before the California courts will accord an administrative decision preclusive effect.' " *(Ibid.)* An administrative decision need not be conducted according to formal trial procedures or judicial rules of evidence to be preclusive. *(Ibid.; People v. Sims, supra,* 32 Cal.3d at pp. 480-48 1.)

. . Contrary to the suggestion of appellants' counsel at oral argument, not all factors relevant to consideration of whether an administrative hearing has a judicial character (such as sworn testimony and adherence to rules of evidence) need be present. An administrative hearing possessing all the attributes of a judicial proceeding certainly satisfies the quasi-judicial standard, as counsel rightly observes. *(Imen v. Glassford* (1988) 201 Cal.App.3d 898, 906-907.) However, an administrative hearing possessing less than all the attributes of a judicial proceeding may also be sufficiently quasi-judicial for collateral estoppel purposes. *(People v. Sims, supra,* at pp. 480-481.) For example, collateral estoppel effect is given to final decisions of the Workers' Compensation Appeals Board and the Public Utilities Commission "even though proceedings before these agencies are not conducted according to judicial rules of evidence. [Citations.] The pertinent inquiry is whether the different standard" for conducting the administrative hearing deprived the parties of "a fair adversary proceeding" in which to fully litigate the issue asked to be given preclusive effect. *(People v. Sims, supra,* 32 Cal.3d at pp. 480-481.) While the MTA hearing did not use formal trial procedures, it nevertheless

provided a fair adversary proceeding in which the determination that ASCI's project delays justified its substitution as a subcontractor was fully litigated.

We are not alone in concluding that a hearing for the substitution of a public works subcontractor is quasi-judicial. In *Interior Systems, Inc. v. Del E. Webb Corp.* (1981) 121 Cal.App.3d 312, 318, the court found that the subcontracting act "has created a quasi-judicial remedy in the form of a hearing before the awarding authority to determine whether proper grounds exist under the act for substitution." The court granted preclusive effect to a county hospital's administrative approval of a subcontractor substitution, and affirmed dismissal of the subcontractor's lawsuit against the prime contractor. *(Id.* at pp. 314-315.) The court reasoned that, "in creating the procedure in [Government Code] section 4107 [now the Public Contract Code], the Legislature intended that the results thereof should be binding on the parties unless found to be erroneous and set aside by a court of review." *(Id.* at p. 318.) We find the reasoning of *Interior Systems, Inc., supra,* a case cited by respondents yet wholly ignored in appellants' briefs, persuasive.

5. Collateral estoppel was properly applied to the particular causes of action

The trial court rightly concluded that the BART and MTA determinations that ASCI had substantially delayed the progress of work on the public transit construction projects barred ASCI from contending otherwise. Appellants argue that, even accepting that conclusion, the trial court should have permitted trial on all of their causes of action and allegations within those causes of action. The argument is untenable. The preclusive effect of the administrative determinations necessarily impacted some of the claims at issue in this case. On the parties' competing causes of action for breach of contract, the court ruled that

ASCI's substantial delay was a material breach of the subcontracts, leaving only Amelco's damages for calculation by the jury. The ruling was correct. The subcontracts expressly required timely performance and authorized termination for work delays.

Liability on the other causes of action remained for trial, although certain subsidiary issues were resolved by application of collateral estoppel. On the discrimination cause of action , the court ruled that ASCI and its principals were collaterally estopped from asserting that Amelco acted with discriminatory intent in terminating the subcontracts. As to ASCI's claim for breach of the implied covenant of good faith and fair dealing, the court found that ASCI could not maintain that Amelco breached the covenant by terminating ASCI without cause. The trial court did not err in concluding that ASCI's substantial work delays, which justified ASCI's termination, circumscribed the issues on these causes of action.

At oral argument, ASCI's counsel denounced Amelco's reliance on the administrative decisions as an offensive use of collateral estoppel (defendant estopped from relitigating issues), as opposed to a defensive use (plaintiff estopped from relitigating issues). (See *Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 329 *(Parklane Hosiery).)* In fact, both offensive and defensive collateral estoppel were applied here. Appellants were estopped from relitigating issues as both defendants and cross-complainants.

Moreover, any suggestion that offensive use of collateral estoppel is impermissible must be rejected. *Parklane Hosiery* itself permitted offensive use of collateral estoppel, and simply observed that additional considerations may arise with offensive use, especially where a stranger to the previous action invokes the doctrine. *(Parklane Hosiery, supra,* 439 U.S. at pp. 329-333.) The considerations articulated by *Parklane Hosiery*

are largely subsumed in the general policy considerations that attend any use of collateral estoppel, leading some courts to observe that "the offensive-defensive distinction is an anachronism no longer deserving of judicial recognition." *(R.E. Spriggs Co. v. Adolph Coors Co.* (1979) 94 Cal.App.3d 419, 429.) Whatever the continued vitality of the distinction, as in *Parklane,* "none of the considerations that would justify a refusal to allow the use of offensive collateral estoppel is present in this case." *(Parklane Hosiery, supra,* at p. 332.)

6. The doctrine of judicial estoppel is inapplicable

As a final argument against application of collateral estoppel, appellants maintain that respondents have taken inconsistent positions on the preclusive effect of the administrative decisions. Appellants assert that Amelco's attorney told BART and MTA that the sole issue for adjudication was substitution on the subcontract, and disclaimed any collateral effect of the adjudication on breach of contract litigation. Appellants ask that respondents be judicially estopped from changing their position to claim collateral estoppel effect now. (See *Hanna v. Los Angeles County Sheriff's Dept.* (2002) 102 Cal.App.4th 887, 896 [stating judicial estoppel principles].)

We first note that appellants did not raise this argument until their reply brief. "Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant." *(Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11.) We therefore do not consider the argument. Even were we willing to overlook appellant's late briefing on this issue, appellants have also forfeited the issue as to Amelco's alleged statement to MTA by failing to provide a record citation. *(Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) While a record citation is provided for the BART hearing, the record fails to support appellants' argument.

Contrary to appellant's argument on appeal, Amelco's counsel did not represent that ASCI could bring a breach of contract claim without the administrative decision having any preclusive effect in the litigation. In fact, Amelco's description of the issue to be administratively adjudicated is consistent with the issue ultimately given collateral estoppel effect. Amelco's counsel told the BART hearing officer: "The only thing that's an issue is whether [appellants] substantially delayed the job, and therefore our request for substitution should be approved." Appellants rely upon Amelco counsel's subsequent remark that "[t]his other stuff" could be raised with BART or in the courts separately. But Amelco's reference to "other stuff" to be adjudicated elsewhere referred to ASCI's claim that the administrative hearing was unduly delayed, which Amelco argued could be raised later. Ultimately, the BART hearing officer disagreed with the limitation advocated by Amelco and specifically addressed the hearing delay issue, finding no delay. The important point, however, is that Amelco's statements in the BART hearing do not show any position inconsistent with the position it took in this litigation, in which it sought preclusive effect for administrative decisions that ASCI's performance on the subcontracts was substantially delayed. Judicial estoppel is inapplicable.

B. Nonsuit on the discrimination cause of action was proper

Appellant ASCI alleged that Amelco discriminated against it as a minority-owned disadvantaged business enterprise (MBE or DBE), and ASCI's principals (who are African-American) asserted individual claims of racial discrimination in violation of federal civil rights. (42 U.S.C. §§ 1981, 2000d.)[3] In the operative cross-complaint, appellants averred that Amelco terminated the subcontracts because ASCI is a minority-owned business. The trial court's collateral estoppel ruling eliminated this basis for asserting racial discrimination, as the court gave preclusive

effect to administrative determinations that ASCI was terminated for work delays.

However, the cross-complaint also alleged that Amelco demanded ASCI's participation in "an illegal scheme to use ASCI's MBE status as a front for Amelco to pass through high-priced equipment [by having ASCI make equipment purchases for Amelco] in order to fraudulently avoid federal regulations and [MTA] contractual obligations to satisfy minority business participation." Appellants later articulated another ground for their discrimination cause of action. Appellants asserted that Amelco and its employees created a hostile work environment by making discriminatory remarks to ASCI's principals and employees.

In anticipation of Amelco's nonsuit motion, the parties stipulated that the jury would be deemed impaneled and sworn and the matter of nonsuit could be presented and ruled on by the court on the basis of appellants' opening statement and offer of proof made prior to jury selection. (See *Fowler v. Seaton* (1964) 61 Cal.2d 681, 683 [same procedure used].) After hearing opening statements and the argument of counsel, the court granted Amelco's motion for partial nonsuit with respect to appellants' discrimination cause of action. (Code Civ. Proc., § 581c.)

1. Appellants stipulated to the nonsuit motion procedure

Appellants contend that the trial court "imposed" an unprecedented "phantom jury" procedure for resolving Amelco's nonsuit motion before a jury was impaneled. The record is clear, however, that appellants freely stipulated to the motion procedure, thus forfeiting any challenge on appeal. *(Jentick v. Pacific Gas & Electric Co.* (1941) 18 Cal.2d 117, 121; *In re S.C.* (2006) 138 Cal.App.4th 396, 406.) Any objection to the submission of a nonsuit motion on an offer of proof must be raised in the trial court. *(Ferris*

v. Gatke Corp. (2003) 107 Cal.App.4th 1211, 1225-1226, fn. 7.) Appellants here not only failed to object, but affirmatively consented to the procedure.

The parties' stipulation was summarized in open court by Amelco's counsel: "what the parties, all parties, have consented to is that the Court can take opening statements and offers of proof made prior to jury selection, as if a jury had already been selected. And then the parties, if they wish to, can make nonsuit motions at the end of those opening statements. The Court can rule on those nonsuits. And then we can go forward, if necessary, and impanel the jury on the remaining issues." Appellants unreservedly participated in the procedure by making opening statements and presenting written offers of proof it directed against the nonsuit motion. The claim on appeal that appellants stipulated to use of the opening statements for resolution of in limine motions, and not nonsuit motions, is belied by the record. Appellants also fail to offer any support for their claim that the motion procedure lacked legal basis. Similar procedures in which the parties agreed to deem a jury sworn for purposes of resolving nonsuit motions have been employed without rebuke. (E.g., *Fowler v. Seaton, supra,* 61 Cal.2d at p. 683; *Curtis v. Santa Clara Valley Medical Center* (2003) 110 Cal.App.4th 796, 800.)

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3 The federal statutes cited in appellants' pleading prohibit discrimination against racial minorities by public or private entities (42 U.S.C. § 1981), and discrimination against racial minorities by recipients of federal aid (42 U.S.C. § 2000d). The transit agencies, not Amelco, were the recipients of federal transportation funding, and thus the latter statute appears inapplicable. (E.g. *Booker v. Board of Education (N.D.N.Y.* 2002) 238 F.Supp.2d 469, 474.) However, respondents have not established that they moved for nonsuit on this basis, and thus we address appellants' discrimination claims under both statutes.

2. Nonsuit was properly granted

a. Nonsuit standards

"A motion for nonsuit may be made after the plaintiff completes the presentation of his or her evidence or after the opening statement. (Code Civ. Proc., § 581c, subd. (a).) If the evidence to be presented would not support a verdict in plaintiff's favor, judgment for the defendant may be entered. [Citation.] ' [A] motion for nonsuit "is the modern equivalent of a *demurrer to the evidence:* it concedes the truth of the facts proved, but denies that they, as a matter of law, sustain the plaintiff's case. [Citations.]" ' " *(Stein-Brief Group, Inc. v. Home Indemnity Co.* (1998) 65 Cal.App.4th 364, 369, italics in original.)

Motions for nonsuit raise issues of law, so "the granting of a nonsuit is reviewed de novo on appeal, using the same standard as the trial court." *(Mejia v. Community Hospital of San Bernadino* (2002) 99 Cal.App.4th 1448, 1458.) Where, as here, a motion for nonsuit is made after the plaintiff's opening statement and offer of proof, we must accept all asserted facts as true " ' "and must indulge every legitimate inference which may be drawn from those facts. [Citations.] A nonsuit at this early stage of the proceedings is disfavored. [Citation.] It can only be upheld on appeal if, after accepting all the asserted facts as true and indulging every legitimate inference in favor of plaintiff, it can be said those facts and inferences lead inexorably to the conclusion plaintiff cannot establish an essential element of its cause of action . . . . " ' " *(Stein-Brief Group, Inc. v. Home Indemnity Co., supra,* 65 Cal.App.4th at p. 369.)

b. The factual assertions could not sustain a discrimination cause of action

Appellants argue that the facts asserted in their opening statement and offer of proof were sufficient to sustain their claims of racial discrimination in violation of

civil rights. The argument, however, is largely unsupported by citation to the record or legal authorities. An appellant's brief must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears" and, to the extent possible, support points raised in the brief with citation of authority. (Cal. Rules of Court, rule 8.204(a)(1)(B) & (C).) " 'The appellate court is not required to search the record on its own seeking error.' " *(Nwosu v. Uba, supra,* 122 Cal.App.4th 1229, 1246.) We therefore focus exclusively upon those points that appellants have properly presented, and pass as waived appellants' generalized and unsubstantiated challenge to the nonsuit ruling.

Appellants present two specific arguments against the nonsuit ruling. First, appellants maintain that the alleged illegal pass-through scheme in which Amelco demanded ASCI act as a front for equipment purchases to satisfy DBE contractual obligations constituted actionable racial discrimination. Second, appellants claim Amelco created a hostile work environment for racial and ethnic minorities because Amelco employees disparaged ASCI's African-American principals and Asian-American employees.

Appellants provide no legal authority for their theory that circumvention of DBE programs is racial discrimination and a denial of civil rights. Appellants' only citation of authority is to cases in which the government criminally prosecuted such conduct as fraud. *(United States v. Brother Construction Company of Ohio, Inc.* (4th Cir. 2000) 219 F.3d 300; *Un ited States v. Duf (N.D.* Ill. 2005) 371 F.Supp.2d 959.) While these cases show the wrongful nature of the alleged conduct, they do not show that ASCI and its principals have a cause of action for racial discrimination. The federal civil rights appellants seek to vindicate address intentional discrimination based on race. *(General Bldg. Contractors Assoc. v. Pennsylvania* (1982)

458 U.S. 375, 382-39 1 [42 U.S.C. § 1981 claim]; see *Alexander v. Choate* (1985) 469 U.S. 287, 292-293 [discussing 42 U.S.C. § 2000d claim].) Appellants offered no evidence they were damaged by *racially motivated* conduct.

As to the alleged hostile work environment created by racial and ethnic disparagement, appellants claim that Amelco's project manager gave ASCI's Asian-American workers negative reviews and the manager said she had problems dealing with people who did not speak English as their first language. Appellants' brief represents that these factual assertions were made in their opening statement, but appellants provide no citation to the record. Appellants' claim of hostile work environment is thus forfeited. *(Nwosu v. Uba, supra,* 122 Cal.App.4th at p. 1246.) Even if we were to consider the claim, it is plain that the alleged remarks by Amelco's project manager do not meet the legal standard of workplace racial or ethnic harassment. The alleged remarks fall far short of showing a workplace "permeated with 'discriminatory intimidation, ridicule, and insult,' [citation] that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.' " *(Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 21.) The trial court did not err in granting nonsuit on appellants' discrimination cause of action.

C. Substantial evidence supports imposition of alter ego liability

The MacCallas are the sole directors and shareholders of ASCI, which declared bankruptcy in 2001. The court determined that ASCI was the alter ego of the MacCallas, and held the MacCallas jointly and severally liable with ASCI.[4] The court found, among other things, that ASCI was undercapitalized and that the MacCallas "exercised complete dominion and control" over ASCI and a related family-owned company, commingled funds

among themselves and the two companies, and used the companies as conduits for their personal business. Appellants claim there is insufficient evidence to support the trial court's determination, and argue that the trial court placed undue emphasis upon ASCI's undercapitalization in finding it to be the MacCallas' alter ego.

"Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations. [Citations.] A corporate identity may be disregarded—the 'corporate veil' pierced—where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation. [Citation.] Under the alter ego doctrine, then, when a corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity, and deem the corporation's acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners." *(Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538.) "In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. [Citations.] 'Among the factors to be considered in applying the doctrine are commingling of funds and other assets of the two entities, the holding out

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4 Appellants maintain that they were wrongly denied a jury trial on the alter ego determination, and certain other claims. The trial record, however, demonstrates appellants' concession that the claims were equitable in nature and properly tried to the court. *(Dow Jones Co. v. Avenel* (1984) 151 Cal.App.3d 144, 147-148.)

by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other.' [Citations.] Other factors which have been described in the case law include inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers. [Citations.] No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied." *(Sonora Diamond Corp. v. Superior Court, supra,* 83 Cal.App.4th at pp. 538-539.)

Appellants' primary argument is that there is no evidence that the corporate form was used to accomplish a wrongful purpose, or that any inequity would flow from recognition of ASCI's separate corporate identity. While ASCI declared bankruptcy, appellants rely upon the judicial observation that "[t]he alter ego doctrine does not guard every unsatisfied creditor of a corporation but instead affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form. Difficulty in enforcing a judgment or collecting a debt does not justify this standard." *(Sonora Diamond Corp. v. Superior Court, supra,* 83 Cal.App.4th at p. 539.)

Appellants deny evidence of bad faith conduct. The trial court found otherwise. Contrary to appellants' claim on appeal, the trial court's imposition of alter ego liability upon the shareholders was not founded on ASCI's financial weakness, as such, but on its shareholders' deceptive undercapitalization of the company, among other factors. The trial court, in explaining its application of alter ego liability, quoted a respected legal commentator on the subject: " 'If a corporation is organized and carries on business without substantial capital in such a way that the corporation is likely to have no sufficient assets available to

meet its debts, it is inequitable that shareholders should set up such a flimsy organization to escape personal liability. The attempt to do corporate business without providing any sufficient basis of financial responsibility to creditors is an abuse of the separate entity and will be ineffectual to exempt the shareholders rom corporate debts. It is coming to be recognized as the policy of the law that shareholders should in good faith put at the risk of the business unencumbered capital reasonably adequate for its prospective liabilities. If the capital is illusory or trifling compared with the business to be done and the risks of loss, this is a ground for denying the separate entity privilege.' " (1 Cox & Hazen Corporations (2d ed. 2003) The Separate Corporate Entity §7.11, p. 291, quoting Henry W. Ballantine, Ballantine Corporations (rev. ed. 1946) pp. 302-303.)

Evidence of deceptive undercapitalization abounds. The evidence established that (1) the MacCallas funded ASCI with a total capitalization of only $10,000, which was spent within a few days of incorporation; (3) a related company, also owned by the MacCallas, received $450,000 on the BART subcontract yet paid less than $36,000 to ASCI, which was the corporation bearing substantial expenses on the subcontract; and (4) the MacCallas, through their related company, charged ASCI over $1 million for two years of consulting services, which represented a third of ASCI's total revenue for the period. Upon this evidence, the trial court reasonably concluded that the MacCallas provided ASCI with capital that was trifling compared with the business to be done and the risks of loss, thus providing a ground for denying the separate entity privilege and imposing alter ego liability upon the MacCallas.

D. The court did not abuse its discretion in sustaining objections to expert testimony

In response to Amelco's claim for breach of contract damages, ASCI presented its own expert witness, Sol Kutner, a construction claims consultant. ASCI first established Kutner's expertise with construction costs and familiarity with multiple documents, including the subcontracts and Amelco's cost calculations, and then asked Kutner if Amelco's claimed costs were recoverable under the subcontracts' legal provisions. The trial court sustained objections to the question, and rephrased variations of essentially the same question, by ASCI's counsel. Appellants argue on appeal that the trial court improperly excluded expert testimony by sustaining objections to Kutner's testimony, but we find no abuse of discretion. (See *Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, 928 [abuse of discretion review standard applies to exclusion of expert testimony].)

Objections to the questions as stated were properly sustained. ASCI was entitled to present a refutation of Amelco's damages, and the trial court's rulings did not preclude relevant testimony. ASCI's questioning of its expert, however, improperly called for a legal conclusion as to the interpretation of the subcontracts, as the trial court explained. An expert's opinion as to the meaning of a contract is "irrelevant to the court's task of interpreting the policy as read and understood by a reasonable lay person." *(National Auto. & Casualty Ins. Co. v. Stewart* (1990) 223 Cal.App.3d 452, 458-459.) It is also well-recognized that "an expert cannot testify to legal conclusions in the guise of expert opinion[.]" (1 Witkin, Cal. Evidence (4th ed. 2000) Opinion Evidence, § 97, p. 644.) The use of expert witnesses "to give opinions as to the application of the law to particular facts usurps the duty of the trial court to instruct the jury on the law as applicable to the facts, and

results in no more than a modern day 'trial by oath' in which the side producing the greater number of [experts] able to opine in their favor wins." *(Downer v. Bramet* (1984) 152 Cal.App.3d 837, 842.) As the trial court told ASCI's counsel in sustaining an objection when the expert was asked if Amelco's claimed damages were allowable under the subcontracts: "You eliminate the Evidence Code by hiring an expert and give him all the records and say do you have an opinion who's right. That's not allowed in California." The trial court was correct.

E. The damages award is proper

1. Appellants fail to establish that the awarded damages compensated illegal acts

Amelco recovered damages for costs incurred in completing the BART and MTA construction projects after ASCI's termination under the subcontracts for substantial work delays. Appellants argue that Amelco should not recover damages because the subcontracts involved illegalities. Appellants allege that Amelco used the subcontracts to pressure ASCI to participate in an "illegal scheme" to act as "a front" to "pass through" equipment purchases that would satisfy Amelco's minority business participation obligations, and terminated ASCI when the subcontractor failed to comply. Appellants also claim that Amelco's damages award includes costs for electrical design work by unlicensed professionals, which constitutes compensation for illegal acts.

Appellants' first argument is difficult to understand. It is far from clear how any thwarted effort to enlist ASCI's participation in fraudulent procurement during the term of the subcontracts relates to completion costs after termination of the subcontracts. The argument also ignores the defeat of appellant's underlying premise—ASCI was terminated for work delays, not for opposition to fraud. As

to the second argument concerning unlicensed work in completing the construction projects, appellants seem to rely upon the principal that an unlicensed professional may not collect for his or her work. (See Bus. & Prof. Code, § 7031.) But appellants fail to offer any authority for the proposition that the victim of a breach of contract must prove that it used licensed professionals before recovering damages. ASCI was responsible for completion of the construction projects. It may not evade that responsibility by interposing the alleged illegal conduct of a third party to deny Amelco compensation.

2. The form of the special verdict on breach of contract damages was proper

The subcontracts provide for an accounting upon the subcontractor's default and termination: if Amelco's costs to complete the project exceed the remaining balance of the amount of the contract, then the excess is owed by ASCI to Amelco, whereas if completion costs are less than the balance owed, Amelco owes the difference to ASCI. In calculating Amelco's completion costs, the subcontracts specify that the costs include "expenses incurred by Contractor [Amelco] in furnishing materials for finishing the work, the attorney fees, and any damages sustained by Contractor by reason of Subcontractor's (ASCI) default plus a markup of 15% General Overhead and 10% profit on any and all of such expenses . . . ."

The special verdict form reflects the terms of the subcontracts. In awarding damages for breach of contract, the jury was asked: "[w]hat is the amount by which Amelco's expenses, including attorneys' fees, plus general overhead and profit at 25% on such expenses, in completing ASCI's scope of work on the BART Project, exceeded the unpaid balance of ASCI's revised subcontract value for the BART Project?" A parallel question from ASCI's point of view was posed asking: "[w]hat is the amount by which

Amelco's expenses, including attorneys' fees, plus general overhead and profit at 25% on such expenses, in completing ASCI's scope of work on the BART Project, is less than the unpaid balance of ASCI's revised subcontract value of the BART Project?" The same questions were asked about the MTA subcontract. The jury found that Amelco's expenses exceeded the unpaid balance on the BART subcontract by $63,838.64, and exceeded the unpaid balance on the MTA subcontract by $500,826.90. The judgment awards these amounts as damages.

Appellants dispute the amount of damages awarded, although the basis for their grievance is uncertain. In their opening brief, appellants seem to argue that the form of the special verdict is improper because the jury was charged with awarding attorney fees when an attorney fee award rests within the exclusive province of the court. But the jury awarded attorney fees as a component of damages incurred in completing the construction projects, not as a separate award for prosecution of the lawsuit. It is the latter type of attorney fee award that rests with the trial court, and was here decided by the trial court after the jury's verdict. Respondents note this fact, and appellants' reply brief does not pursue the matter. Instead, appellants raise an entirely new argument. Appellants turn to the attorney fees awarded by the court for prosecuting the lawsuit, and maintain that the amount awarded was excessive because it encompasses fees incurred on the BART subcontract when only the MTA subcontract has an attorney fee provision. We will not consider an issue raised for the first time in appellants' reply brief. *(Varjabedian v. City of Madera, supra,* 20 Cal.3d at p. 295, fn. 11.) Appellants framed the issues on appeal in their opening brief and may not raise new issues when respondents have no opportunity to brief the matter.

DISPOSITION The judgment is affirmed.

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Sepulveda, J.

We concur:

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Ruvolo, P.J.

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Reardon, J.

APPENDIX C
JUDGEMENT
FILED
ALAMEDA COUNTY OCT 22 2004

CLERK OF THE SUPERIOR COURT s// S. Taylor

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA
SOUTHERN DIVISION (HAYWARD)

Case No. H-184673-9

AMELCO INDUSTRIES, INC., a California corporation
Plaintiff,

vs.

AUTOMATED SWITCHING & CONTROLS, INC.
A California corporation; ERIC MACCALLA, an individual;
JOHNETTA MACCALLA, an individual; and DOES I-50. Inclusive,
Defendants,

AND RELATED CROSS-ACTION

Between September 2 and 15, 1997, pursuant to the stipulation of the parties, the following causes of action of plaintiff and cross-defendant Amelco Industries, Inc.'s ("Amelco") First Amended Complaint (the "Complaint") and defendant and cross-complainant Automated Switching & Controls, Inc.'s ("ASCI") Second Amended Cross-complaint (the "Cross-complaint") came on regularly for trial by the Court, in Department 81 of the Superior Court for the State of California, County of Alameda, the Honorable Richard A. Hodge, presiding:

1. The 4th cause of action of Amelco's Complaint for declaratory relief against ASCI with respect to the subcontract agreement between Amelco and ASCI for the San Francisco Municipal Metropolitan Turnback Facility (Contract No. MR-1150) (the "MUNI Subcontract"); and
2. The 16th cause of action of ASCI's Cross-complaint for breach of contract against Amelco with respect to the MUNI Subcontract.

William T. Eliopoulos, Esq. and John L. Antracoli, Esq. then of the law firm of Bergeson, Eliopoulos, Grady & Gray, LLP appeared as counsel of record for Amelco and Mark L. Strombotne, Esq. and Sharonrose Cannistraci, Esq. of the Strombotne Law Firm appeared as counsel of record for ASCI and defendants and cross-complainants Eric and Johnetta MacCalla (collectively, the "MacCallas").

After hearing the evidence, and the argument of counsel, on October 30, 1997, the Court rendered its Statement of Decision finding in favor of ASCI, and against Amelco, on the 4th cause of action of Amelco's Complaint, and in favor

of ASCI, and against Amelco, on the 16th cause of action of ASCI's Cross-complaint. The Court awarded ASCI damages of $71,116, plus pre-judgment interest pursuant to Civil Code Section 3287 at the rate of ten percent (10%) per annum from November 9, 1995, until the judgment is paid or offset, with the exception that no interest would accrue during the stay of the trial of the remainder of the action as ASCI pursued a petition(s) for it of mandamus with respect to the San Francisco Bay Area Rapid Transit District ("BART") and Los Angeles County Metropolitan Transportation Authority ("LACMTA") determinations pursuant to Public Contracts Code Section 4107.

Amelco's Motion Re Collateral Estoppel came on regularly for hearing before this Court on April 21, 2000, and August 4, 2000, before the Honorable Joseph Carson. William T. Eliopoulos, Esq. and John L. Antracoli, Esq. then of the law firm of Bergeson Eliopoulos LLP, appeared on behalf of Amelco, Shaaron Bangs, Esq. of the law firm of Crawford & Bangs appeared on behalf of ASCI, and the MacCallas represented themselves in propria persona. After having considered the papers in support of and in opposition to the Motion, and the oral argument of counsel, and good cause appearing, the Court ordered that: (i) the final determination of BART pursuant to Public Contracts Code Section 4107, that ASCI substantially delayed the progress of the work on the BART Radio Plan "B" Project (the "BART Project") without excuse or justification was entitled to collateral estoppel effect in this matter, and (ii) the final determination of LACMTA pursuant to Public Contracts Code Section 4107, that ASCI substantially delayed the progress of the work on the LACMTA Contract No. B641 Project (the "LACMTA Project") without excuse or justification was entitled to collateral estoppel effect in this matter. The precise collateral estoppel effect of the

BART and LACMTA final determinations in this action was deferred for further hearings.

Thereafter, trial of this action resumed with the Honorable Joseph Carson, presiding. Pursuant to the stipulation of the parties, between November 27 and December 1, 2000, the following causes of action in this action came on regularly for trial in Department 140 of the Superior Court of the State of California, the Honorable Joseph Carson presiding:

1. The 10th cause of action of ASCI's Cross-complaint for rescission of the BART and LACMTA Subcontracts; and

2. The 11th cause of action of ASCI's Cross-complaint for reformation of the BART and LACMTA Subcontracts.

William T. Eliopoulos, Esq. and John L. Antracoli, Esq. then of the law firm of Bergeson Eliopoulos, LLP appeared as counsel of record for Amelco, Shaaron Bangs, Esq. of the law firm of Crawford & Bangs appeared as counsel of record for ASCI, and the MacCallas represented themselves in propria persona.

After hearing the evidence, and the argument of counsel, on December 1, 2000, the Court announced its decision with respect to the foregoing causes of action, finding in favor of Amelco, and against ASCI, on each cause of action. No statement of decision was requested by the parties.

On various dates between December 1, 2000 and March 6, 2002, a number of pre-trial hearings were held for the purpose of, inter alia, determining the precise collateral

estoppel effect upon this action of the BART and LACMTA final determinations under pursuant to Public Contracts Code Section 4107, and Amelco's anticipated motions for non-suit with respect thereto. For the purposes of said hearings, and Amelco's anticipated motions for non-suit, the parties stipulated to a jury being selected, the making of opening statements, and the making of motions for non-suit after opening statements. Said hearings were held on, among other dates, January 16, 2001, February 9, 2001, February 26, 2001, November 1, 2001, November 27, 2001, January 14, 2002, and February 5, 2002. At each of said hearings, William T. Eliopoulos, Esq. and John L. Antracoli, Esq. then of the law firm of Bergeson Eliopoulos, LLP appeared as counsel of record for Amelco, Shaaron Bangs, Esq. of the law firm of Crawford & Bangs appeared as counsel of record for ASCI, and the MacCallas represented themselves in propria persona. The Honorable Joseph Carson presided over each of said hearings.

After hearing opening statements, and the argument of counsel, the Court made the following orders with respect to the collateral estoppel effect in this action of the BART and LACMTA final determinations pursuant to Public Contracts Code Section 4107:

As to Amelco's First Cause of Action for breach of its subcontract with ASCI pertaining to the BART Project (the "BART Subcontract"), application of collateral estoppel estopped ASCI from denying that it substantially delayed the progress of the work on the BART Project without excuse or justification. ASCI's substantial delays to the progress of the work on the BART Project was sufficient to justify Amelco's termination of the BART Subcontract for ASCI's breach thereof pursuant to Section "H. DEFAULT" of the BART Subcontract. Thus, the only issue remaining for the trial on Amelco's First Cause of

Action for breach of the BART Subcontract is the amount of damages, if any, to be awarded pursuant to "Section H. DEFAULT" of the BART Subcontract.

As to Amelco's Second Cause of Action for declaratory relief pertaining to its termination of the BART Subcontract, application of collateral estoppel estopped ASCI from denying that it substantially delayed the progress of the work on the BART Project without excuse or justification. ASCI's substantial delays to the progress of the work on the BART Project was sufficient to justify Amelco's termination of the BART Subcontract for ASCI's breach thereof pursuant to Section "H. DEFAULT" of the BART Subcontract. Thus, on Amelco's Second Cause of Action for declaratory relief against ASCI with respect to the BART Subcontract, Amelco is entitled to judgment in its favor, and against ASCI, declaring and decreeing that:

> Amelco's termination of ASCI and the BART Subcontract pursuant to Section "H. DEFAULT" of the terms and conditions of the BART Subcontract is and was justified, lawful and proper.

As to Amelco's Fifth Cause of Action for breach of its subcontract with ASCI pertaining to the LACMTA Project (the "LACMTA Subcontract"), application of collateral estoppel estopped ASCI from denying that it substantially delayed the progress of the work on the LACMTA Project without excuse or justification. ASCI's substantial delays to the progress of the work on the LACMTA Project was sufficient to justify Amelco's termination of the LACMTA Subcontract for ASCI's breach thereof pursuant to Section "H. DEFAULT" of the LACMTA Subcontract. Thus, the only issue remaining for the trial on Amelco's Fifth Cause of Action for breach of

the LACMTA Subcontract is the amount of damages, if any, to be awarded pursuant to Section "H. DEFAULT" of the LACMTA Subcontract.

As to Amelco's Sixth Cause of Action for declaratory relief pertaining to its termination of the LACMTA Subcontract, application of collateral estoppel estopped ASCI from denying that it substantially delayed the progress of the work on the LACMTA Project without excuse or justification. ASCI's substantial delays to the progress of the work on the LACMTA Project was sufficient to justify Amelco's termination of the LACMTA Subcontract for ASCI's breach thereof pursuant to Section "H. DEFAULT" of the LACMTA Subcontract. Thus, on Amelco's Sixth Cause of Action for declaratory relief against ASCI with respect to the LACMTA Subcontract, Amelco is entitled to judgment in its favor, and against ASCI, declaring and decreeing that:

> Amelco's termination of ASCI and the LACMTA Subcontract pursuant to Section "H. DEFAULT" of the terms and conditions of the LACMTA Subcontract is and was justified, lawful and proper.

As to ASCI's Second Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing contained in the BART and LACMTA Subcontracts, collateral estoppel estopped ASCI from asserting that Amelco did not have sufficient cause to terminate the BART and LACMTA Subcontracts pursuant to Section "H. DEFAULT" of the BART and LACMTA Subcontracts. ASCI cannot recover against Amelco under this cause of action on that basis that Amelco did not have sufficient cause to terminate the BART and LACMTA Subcontracts

pursuant to Section "H. DEFAULT" of said subcontracts. [See, Cross-complaint, ¶¶ 101, 102, 103 and 105].

As to ASCI's Thirteenth Cause of Action for Breach of the BART Subcontract, collateral estoppel estopped ASCI from asserting that Amelco did not have sufficient cause to terminate the BART Subcontract pursuant to Section "H. DEFAULT" of the BART Subcontract. ASCI cannot recover against Amelco under this cause of action on the basis that Amelco did not have sufficient cause to terminate the BART Subcontract pursuant to Section "H. DEFAULT" thereof. [See, ¶ 254 of Cross-Complaint];

As to ASCI's Seventeenth Cause of Action for Breach of the LACMTA Subcontract, collateral estoppel estopped ASCI from asserting that Amelco did not have sufficient cause to terminate the LACMTA Subcontract pursuant to Section "H. Default" of the LACMTA Subcontract. ASCI cannot recover against Amelco under this cause of action on the basis that Amelco did not have sufficient cause to terminate the LACMTA Subcontract pursuant to Section "H. DEFAULT" thereof [See, ¶ 285 of Cross-Complaint]; and As to ASCI's Twenty-third Cause of Action for Discrimination, collateral estoppel estopped ASCI from asserting that Amelco's termination of the BART and LACMTA Subcontracts was with the intent to discriminate against ASCI. ASCI cannot recover against Amelco under this cause of action on the basis that Amelco acted with discriminatory intent in terminating the BART and LACMTA Subcontracts. [See, Cross-complaint, ¶¶ 331 and 332].

Further, after hearing opening statements, and the argument of counsel, the Court, the Honorable Joseph Carson presiding, on January 14, 2002, granted Amelco's

motion for non-suit with respect to ASCI's claims of discrimination [23rd cause of action of the Cross-complaint].

Between March 7, 2002 and March 21, 2002, the following causes of action in this action came on regularly for trial in Departments 601 and 608 of the Superior Court of California, County of Alameda, the Honorable Joseph Carson, presiding:

1. The 1st cause of action of Amelco's Complaint against ASCI for breach of the BART Subcontract;

2. The 5th cause of action of Amelco's Complaint against ASCI for breach of the LACMTA Subcontract;

3. The 2nd cause of action of ASCI's Cross-complaint against Amelco for breach of the implied covenant of good faith and fair dealing with respect to the BART and LACMTA Subcontract;

4. The 13th cause of action of ASCI's Cross-complaint for breach of the BART Subcontract;

5. The 17th cause of action of ASCI's Cross-complaint for breach of the LACMTA Subcontract; and

6. The 20th cause of action of ASCI's Cross-complaint against Amelco for inducement to breach the employment contract.

During said trial, William T. Eliopoulos, Esq. and John L. Antracoli, Esq. then of the law firm of Bergeson

Eliopoulos, LLP appeared as counsel of record for Amelco, Shaaron Bangs, Esq. of the law firm of Crawford & Bangs appeared as counsel of record for ASCI, and the MacCallas represented themselves in propria persona.

A jury of twelve persons was regularly impaneled and sworn. Witnesses were sworn and testified and the jury heard the evidence. Prior to the closing argument of counsel and instruction of the jury, ASCI dismissed the 13th cause of action and 17th cause of action of its Cross-complaint for breach of the BART and LACMTA Subcontracts, respectively. Also prior to the closing argument of counsel and instruction of the jury, Amelco moved for non-suit as to ASCI's claim, contained in the 2nd cause of action of the Cross-complaint, based upon the way Amelco attempted to assign procurement responsibilities to ASCI under the LACMTA Subcontract [i.e., alleged illegal pass-through]. The Court granted Amelco's motion for non-suit as to this theory of breach of the implied covenant of good faith and fair dealing.

Thereafter, the jury heard the closing arguments of counsel, the jury was instructed by the Court and the cause was submitted to the jury. The jury deliberated and thereafter returned into court with the following special verdict:

> Plaintiff Amelco Industries, Inc.'s ("Amelco") Breach of Contract Cause of Action Against Defendant Automated Switching & Controls, Inc. ("ASCI") (BART).

Question No. 1: Were Amelco's expenses, including attorneys' fees, plus general overhead and profit at 25% on such expenses, in completing ASCI's scope of work on the

BART Project, caused by ASCI's breach of the BART Subcontract?

Answer "yes" or "no". Answer: Yes

12 yes 0 no

If you answer "no" to Question No. 1, go to Question No. 5. If you answer "yes" to Question No. 1, go to Question No. 2.

Question No. 2: Did Amelco's expenses, including attorneys' fees, plus general overhead and profit at 25% on such expenses, in completing ASCI's scope of work on the BART Project, exceed the unpaid balance of ASCI's revised subcontract value for the BART Project?

Answer "yes" or "no". Answer: Yes 12 yes 0 no

If you answer Question No. 2 "no" go to Question No. 4. If you answer Question No. 2 "yes", then answer Question No. 3.

Question No. 3: What is the amount by which Amelco's expenses, including attorneys' fees, plus general overhead and profit at 25% on such expenses, in completing ASCI's scope of work on the BART Project, exceeded the unpaid balance of ASCI's revised subcontract value for the BART Project?

Answer: $63,838.64 12 yes 0 no

(OR) Question No. 4: What is the amount by which Amelco's expenses, including attorneys' fees, plus general overhead and profit at 25% on such expenses, in completing ASCI's scope of work on the BART Project, is less than the unpaid balance of ASCI's revised subcontract value of the BART Project?

Answer: $_____

Go to Question No. 5.

Amelco's Cause of Action for Breach of Contract Against ASCI (MTA)

Question No. 5: Were Amelco's expenses, including attorneys' fees, plus general overhead and profit at 25% on such expenses, in completing ASCI's scope of work on the MTA Project, caused by ASCI's breach of the MTA Subcontract?

Answer "yes" or "no". Answer: Yes 12 yes

If you answer Question No. 5 "no," go to Question No. 9. If you answer "yes" to Question No. 5, go to Question No. 6.

Question No. 6: Did Amelco's expenses, including attorneys' fees, plus general overhead and profit at 25% on such expenses, in completing ASCI's scope of work on the MTA Project, exceed the unpaid balance of ASCI's revised subcontract value for the MTA Project?

Answer "yes" or "no". Answer: Yes

12 yes

If you answer Question No. 6 "no" go to Question No. 8. If you answer Question No. 6 "yes", then answer Question No. 7.

Question No. 7: What is the amount by which Amelco's expenses, including attorneys' fees, plus general overhead and profit at 25% on such expenses, in completing ASCI's scope of work on the MTA Project, exceeded the unpaid balance of ASCI's revised subcontract value for the MTA Project?

Answer $500,826.90 12 yes

Go to Question No. 9

(OR) Question No. 8: What is the amount by which Amelco's expenses, including attorneys' fees, plus general overhead and profit at 25% on such expenses, in completing ASCI's scope of work on the MTA Project, is less than the unpaid balance of ASCI's revised subcontract value for the MTA Project?

Answer: $

Go to Question No. 9.

ASCI's Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing Against Amelco (BART)

Question No. 9: Did Amelco breach the implied covenant of good faith and fair dealing in its subcontract with ASCI for the BART Project by hiring Kurt Drummond?

Answer "yes" or "no".

Answer No 9 no, 3 yes

If you answer Question No. 9 "no", go to Question No. 12. If you answer Question No. 9 "yes", go to Question No. 10.

Question No. 10: Did Amelco's breach of the implied covenant of good faith and fair dealing in hiring of Kurt Drummond cause ASCI any damage?

Answer: "yes" or "no"

Answer:_____

If you answer Question No. 10 "no", go to Question No. 12. If you answer Question No. 10 "yes", go to Question No. 11.

Question No. 11: What is the total amount of damages ASCI has suffered as a result of Amelco's hiring of Kurt Drummond?

Answer: $_____

Go to Question No 12

ASCI's Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing Against Amelco (MTA)

Question No. 12: Did Amelco breach the implied covenant of good faith and fair dealing in its subcontract with ASCI for the MTA Project by hiring Kurt Drummond?

Answer "yes" or "no".

Answer: Yes 11 yes, 1 no

If you answer Question No. 12 "no", go to Question No. 15. If you answer Question No. 12 "yes", go to Question No. 13.

Question No. 13: Did Amelco's breach in the hiring of Kurt Drummond cause ASCI any damage?

Answer "yes" or "no".

Answer: No 10 no, 2 yes

If you answer Question No. 13 "no", go to Question No. 15. If you answer Question No. 13 "yes", go to Question No. 14.

Question No. 14: What is the total amount of damages ASCI has suffered as a result of Amelco's hiring of Kurt Drummond?

Answer: $

Go to Question No. 15.

ASCI's Cause of Action for Inducement to Breach Employment Agreement Against Amelco

Question No. 15: Did Amelco intentionally engage in acts or conduct which induced Kurt Drummond to breach his contract with ASCI?

Answer "yes" or "no".

Answer: No 10 no, 2 yes

If you answer Question No. 15 "no," go to Question No. 19. If you answer Question No. 15 "yes," go to Question No. 16.

Question No. 16: Did Amelco intend to induce a breach of such contract? Answer "yes" or "no".

Answer:

If you answer Question No. 16 "no", go to Question No. 19. If you answer Question No. 16 "yes", go to Question No. 17.

Question No. 17: Did Amelco's intentionally inducing Kurt Drummond to breach his contract with ASCI cause ASCI any damage?

Answer "yes" or "no"

Answer_____

If you answer Question No. 17 "no", go to Question No. 19. If you answer Question No. 17 "yes," go to Question No. 18.

Question No. 18: What is the total amount of all damage suffered by ASCI caused by Amelco's intentionally inducing Kurt Drummond to breach his contract with ASCI?

Answer: $

Go to Question 19.

During the period of September 2, 2003 and September 5, 2003, and January 5, 2004 and January 14, 2004, Amelco's causes of action against the MacCallas pursuant to which Amelco sought to hold the MacCallas personally liable for the debts of ASCI based on the alter ego doctrine came on regularly for trial in Departments 512, 515 and 511 of the Superior Court for the State of California, County of Alameda, the Honorable Joseph Carson presiding. During said trial, John L. Antracoli, Esq. of the law firm of Rutan & Tucker, LLP appeared as counsel of record for Amelco and Brenda Reddix-Smalls, Esq. of the law firm of Reddix-Smalls & Associates, Melvin S. Hodges, Esq. of the Law Offices of Melvin S. Hodges and Danette Kamahele of the Law Offices of Danette Kamahele appeared as counsel of record for the MacCallas and ASCI.

After hearing the evidence, and the argument of counsel, on March 11, 2004, the Court rendered its Statement of Decision finding in favor of Amelco, and against the MacCallas, on Amelco's alter ego claims against the MacCallas.

On September 27 and 28, 2004, hearings were held on several motions with respect to the above matter in Department 518 of the above-entitled court, the Honorable Joseph J. Carson presiding, including, inter alia, the court's own motion for dismissal of the 14th (Action on Stop Notice Release Bond - BART Against Amelco and United Pacific Insurance Company), 15th (Action on Payment Bond - BART Against Amelco and Reliance Insurance Company), 18th (Action on Stop Notice Release Bond - LACMTA Against Amelco and United Pacific Insurance Company), and 19th (Action on Payment Bond - LACMTA Against Amelco and Reliance Insurance Company) causes of action of the Cross-complaint. On September 28, 2004, the court granted said motion dismissing the 14th, 15th, 18th, and 19th causes of action of the Cross-complaint based on the ground that prior proceedings determined the issue of liability in favor of Amelco, United Pacific Insurance Company and Reliance Insurance Company on said causes of action and that ASCI could not recover on said causes of action as a matter of law based on the allegations of the Cross-complaint, and that Amelco, United Pacific Insurance Company and Reliance Insurance Company were entitled to judgment in their favor on said causes of action.

IT APPEARING by reason of the foregoing that each party is entitled to judgment as follows, IT IS NOW THEREFORE ORDERED, ADJUDGED AND DECREED that:

Amelco's First Amended Complaint

1. Amelco is entitled to a judgment in its favor and against ASCI and the MacCallas on the 1st cause of action of the Complaint for breach of the BART Subcontract in the amount of $63,838.64 together with prejudgment interest thereon at the rate of ten percent (10%) per annum pursuant to Civil Code Section 3287 from and after December 31, 1997, to the entry of judgment;

2. Amelco is entitled to a judgment in its favor and against ASCI and the MacCallas on the 2nd cause of action of the Complaint for declaratory relief with respect to the BART Subcontract, and a declaration providing that Amelco's termination of ASCI and the BART Subcontract pursuant to Section "H. DEFAULT" of the terms and conditions of the BART Subcontract is and was justified, lawful and proper;

3. ASCI is entitled to judgment in its favor on Amelco's on the 4th cause of action of the Complaint for declaratory relief with respect to the MUNI Subcontract;

4. Amelco is entitled to a judgment in its favor and against ASCI and the MacCallas on the 5th cause of action of the Complaint for breach of the LACMTA Subcontract in the amount of $500,826.90 together with prejudgment interest thereon at the rate of ten percent (10%) per annum from and after July 31, 2000, to the entry of judgment; and

5. Amelco is entitled to a judgment in its favor and against ASCI and the MacCallas on the 6th cause of action of the Complaint for declaratory relief with respect to the LACMTA Subcontract, and a declaration providing that Amelco's termination of ASCI and the LACMTA Subcontract pursuant to Section "H. DEFAULT" of the terms and conditions of the LACMTA Subcontract is and was justified, lawful and proper.

ASCI's Cross-complaint

1. Amelco is entitled to judgment in its favor on the 2nd cause of action of ASCI's Cross-complaint for breach of the implied covenant of good faith and fair dealing, and ASCI shall take nothing thereby;

2. Amelco is entitled to judgment in its favor on the 10th cause of action of ASCI's Cross-complaint for rescission of the BART and LACMTA Subcontracts, and ASCI shall take nothing thereby;

3. Amelco is entitled to judgment in its favor on the 11th cause of action of ASCI's Cross-complaint for reformation of the BART and LACMTA Subcontracts, and ASCI shall take nothing thereby;

4 Amelco is entitled to judgment in its favor on the 13th cause of action of ASCI's Cross-complaint for breach of the BART

Subcontract, and ASCI shall take nothing thereby;

5. Amelco and United Pacific Insurance Company are entitled to judgment in their favor on the 14th cause of action of the Cross-Complaint - Action on Stop Notice Release Bond - BART, and ASCI shall take nothing thereby;

6. Amelco and Reliance Insurance Company are entitled to judgment in their favor on the 15th cause of action of the Cross-Complaint - Action on Payment Bond - BART; and ASCI shall take nothing thereby;

7. ASCI is entitled to judgment in its favor and against Amelco on the 16th cause of action of the Cross-complaint for breach of the MUNI Subcontract in the amount of $71,116, plus prejudgment interest pursuant to Civil Code Section 3287 at the rate of ten percent (10%) per annum from November 9, 1995, until the amount is paid or offset, except during that period in which this action was stayed while ASCI pursued its Petition(s) for Writ of Mandamus with respect to the BART and LACMTA final determinations;

8. Amelco is entitled to judgment in its favor on the 17th cause of action of the Cross-complaint for breach of the LACMTA Subcontract, and ASCI shall take nothing thereby;

9. Amelco and United Pacific Insurance Company are entitled to judgment in their favor on the 18th cause of action of the Cross-Complaint - Action on Stop Notice Release Bond - LACMTA, and ASCI shall take nothing thereby;

10. Amelco and Reliance Insurance Company are entitled to judgment in their favor on the 19th cause of action of the Cross-Complaint - Action on Payment Bond - LACMTA; and ASCI shall take nothing thereby;

11. Amelco is entitled to judgment in its favor on the 20th cause of action of ASCI's Cross-complaint for inducement to breach employment agreement, and ASCI shall take nothing thereby.

12. Amelco is entitled to judgment in its favor on ASCI's claims for discrimination [23rd Cause of Action of Cross-complaint], and ASCI shall take nothing thereby.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Amelco Industries shall have and recover from Automated Switching & Controls, Inc. and the MacCallas jointly and severally, the sum of $688,587.57, inclusive of prejudgment interest through October 1, 2004, plus further prejudgment interest from and after October 2, 2004, at the rate of $135.22 per day until the entry of judgment, together with attorneys' fees, costs of suit and disbursements of counsel in an amount to be determined by memorandum of costs or motion subsequent to the entry of judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that United Pacific Insurance Company and Reliance Insurance Company shall recover from Automated Switching & Controls, Inc. attorneys' fees and costs of suit in an amount to be determined by memorandum of costs and motion subsequent to the entry of judgment.

Dated: 10/22 , 2004

s// Judge Carson

JUDGE OF THE SUPERIOR COURT

APPENDIX D

No. BS 051486

JUDGMENT DENYING PETITION FOR WRIT OF MANDAMUS

ORIGINAL FILED

SEP 15 1998

LOS ANGELES SUPERIOR COURT

AUTOMATED SWITCHING & CONTROLS, INC.,
a California corporation,

Petitioner,

VS.

BAY AREA RAPID TRANSIT DISTRICT; LOS ANGELES COUNTY METROPOLITAN TRANSIT AUTHORITY,

Respondents,

AMELCO INDUSTRIES,INC.,

Real Party in Interest

Petitioner Automated Switching & Controls, Inc.'s ("ASCI') petition for a writ mandamus with respect to respondent Los Angeles County Metropolitan Transportatia Authority's ("LACMTA°) decision to allow real party in interest Amelca Industries, in ("Amelco") to substitute ASCI on LRCM T A`s B641 Radio Contract (the "Contrac pursuant to Public Contracts Code § 4107(a)(7) came on regularly for hearing Department 86 of the above-captioned court on August 26, 1998, the Honorable Day Yaffe, presiding. Shaaron Bangs, Esq. of the law firm of Crawford & Bangs appeared behalf of ASCI, Richard Chastang, Esq. appeared on behalf of LACMTA, and William Eliopoulos, Esq. of the law firm of Bergeson, Eliopoulos, Grady & Gray, LLP appear on behalf of Amelco.

The Court having considered the papers submitted by all parties, having received and examined the record of the administrative proceedings, counsel having been given the opportunity to argue, being fully advised in this matter, and good use appearing therefore:

IT IS HEREBY ORDERED THAT:

1. The petition filed in this action is denied on the grounds that Petitioner's request for mandamus is moot *due* to the fact that Respondent's project is essentially complete and such relief would serve no useful purpose.

DATED: September 15, 1998 s/ David P. Yaffe
Judge of Superior Court
Judge David P. Jaffe

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

MINUTES **DEPT 86**

DATE: 08/26/98
9:30 AM BS051486

Judge
HONORABLE
DAVID YAFFEE

Plantiff Counsel
SHAARON A. BANGS (X)

AUTOMATED
SWITCHING &
CONTROLS, INC

Defendant Counsel
RICHARD P.CHASTANG (X)
WILLIAM T.ELIOPOULOS RPI

VS
BAY AREA RTD ET AL

NATURE OF PROCEEDINGS:

HEARING – WRIT OF MANDATE;

Parties appear and submit to the tentative ruling

Petition for Writ of Mandate is denied.

No court has held that a substituted subcontractor has a remedy by way of mandamus to challenge a decision by an owner-agency to permit the prime contractor to substitute subcontractors. The Supreme Court did NOT so hold in SOUTHERN CA: ACOUSTICS CO. v. CV HOLDER. INC., 71 Cal. 2d 719(1969). The subcontractor in that case did seek a writ of mandamus to compel the school district to rescind its consent to a change in subcontractors, but the trial court dismissed that proceeding and the subcontractor did not appeal. The Supreme Court held only that the substituted subcontractor had a remedy against the prime

contractors for damages, but no remedy against the school district.

Assuming but not deciding, that such a remedy existed at one time in this case, petitioner's right to such relief has become moot. Itr will serve no useful purpose for this court to decide, almost three years after the fact, whether respondent MTA granted petitioner a fair trial when it decided to permit the prime contractor to substitute subcontractors.

Respondent shows that the project is now complete except for minor cosmetic work (Kelsey declaration 4:4-5). The court admits said evidence pursuant to
Code of Civil Procedure Section 1094.5(e), and finds
that a writ remanding the matter to the MTA at this time would serve no useful purpose because the subcontract work in question has already been per-formed. The prime contractor and subcontractor are now interested in the issue solely because they are engaged in litigation in Alameda County in which each seeks money damages from the other. The issues in that litigation are not before this court, and that action constitutes a plain, speedy, and adequate remedy at *law, within* the meaning cf Code of Civil Procedure Section 1086.

Counsel for respondent is to submit a proposed judgment within 10 days, together with a proof of service showing that a copy has been served upon all other counsel. The court will hold it for 10 days before signing and filing it.

MINUTES ENTERED
08/26/98
COUNTY CLERK